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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

In re Marriage of JAYSON and  
MICHELLE MINARD.

H026747  
(Santa Cruz County  
Super. Ct. No. FL13635)

JAYSON MINARD,

Appellant,

v.

MICHELLE MINARD,

Respondent.

**I. INTRODUCTION**

In this family law matter, petitioner Jayson Minard appeals from a judgment awarding spousal support and attorney's fees to respondent Michelle Minard. We shall affirm.

**II. PROCEDURAL BACKGROUND**

Michelle and Jayson<sup>1</sup> were married in June 1992. The stipulated date of separation is March 6, 2000, making theirs a marriage of almost eight years.

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<sup>1</sup> For clarity, we shall refer to the parties by their first names. We intend no lack of respect in so doing.

Jayson moved out of the family home in April 2000. At the time, he and Michelle had three children who were three, four, and six years old. Jason voluntarily paid Michelle \$5,000 to \$6,000 per month as support for her and the children.

Jayson filed the petition for dissolution in February 2001. A judgment of dissolution was entered early in the proceedings and issues relating to custody, visitation, and support were litigated separately. Michelle obtained the first order for support in July 2001. That order set child support at \$3,299 per month and spousal support at \$1,363 per month.

Several hearings on various issues were held over the next two years. On July 1, 2003, Jayson filed an application for an order to show cause why child support, visitation, and spousal support should not be modified. Jayson's concern was that he was not earning as much as he had been and he wanted the support orders to be reduced. Jayson was by now living in Canada and argued that since he was paid in Canadian dollars, the U.S. equivalent was much less. Michelle opposed the request, citing Jayson's failure to include adequate information about his current finances and disputing Jayson's exchange rate calculations.

At trial, which began on July 22, 2003, the trial court ordered that issues of child support and visitation be heard and decided by the family law judge in separate proceedings to be held later. The issues at trial were limited to: (1) assignment of assets and debts, (2) spousal support, and (3) attorney's fees.

Jayson appeared in propria persona. Michelle was represented by counsel. Jayson explained to the court the manner in which he thought the property should be divided. He asked the court to limit spousal support to half the length of the marriage. And he urged the court to order the parties to bear their own attorney's fees. Michelle argued for a different division, based upon her allegation that Jayson had not fully informed her about certain loan and stock option transactions. She also asked for spousal support of \$3,000 per month until September 2005 and asked for an award of attorney's fees.

The trial court found that Jayson had breached his fiduciary duty in connection with the loan and stock options. The court divided the assets and debts taking the breach into account. The court also found that Michelle was progressing to self sufficiency and would complete her retraining in June 2005. The court awarded her spousal support of \$2,750 per month until September 2006, at which time the support order is to terminate. The court also awarded her attorney's fees of \$19,836.63.

### **III. FACTS**

Jayson and Michelle met and married in Colorado. Michelle was a high school graduate. She had worked as a waitress while in high school. Afterward, she worked as a delivery person for a travel agency and as a cashier in a food store. Soon, she went to work in her father's hobby shop, which is where she was employed when she met Jayson.

Michelle managed the books for the hobby store and sometimes worked the cash register up front. She took a bookkeeping class in connection with her work for her father. There was no computer in the store and Michelle never received any training in computerized bookkeeping or accounting. She did all the accounting by hand, including the payroll for the store's five employees. Michelle did not know whether the books she kept were double-entry accounting or not. After she met Jayson, he brought in a computer that had a program he wrote to keep track of the store's sale of Lionel trains. Altogether, Michelle worked for her father for about six or seven years, making about \$800 per month the entire time.

After Jayson and Michelle were married, Michelle continued working for her father until shortly before the couple's first child was born. Following the birth of their first child, the couple had two more children, 17 and 15 months apart. Michelle never returned to the workforce, but stayed at home to care for the children while Jayson pursued a career in the technology industry.

Jayson has a high school diploma and one semester of college. He and Michelle moved from Colorado to Scotts Valley, California, so that Jayson could take a job with

Borland Software Corporation in October 1995. The family rented a home for which they were paying \$2,500 per month at the time of separation. Jayson left Borland after about a year when Microsoft recruited him; but he ultimately did not take a job with Microsoft. Instead, he went to work for a series of different companies, and, at the time of trial, was the “VP of Systems” with a company in Canada.

Jayson’s Social Security earnings history reveals that his Medicare taxable income for the years 1995 through 2001 was, respectively: \$81,117, \$94,514, \$127,114, \$157,446, \$159,602, \$820,408,<sup>2</sup> and \$182,593. Jayson explained that he never had a salary of more than \$160,000 but that he did receive regular bonuses and stock options. He was earning \$140,000 per year (Canadian) at his current job. His income and expense declaration states that his average monthly earnings for the 12 months before trial had been \$11,333 (U.S. dollars) or about \$135,996 per year.

When Jayson moved out of the family home in April 2000, Michelle remained in the home and cared for the children, only one of whom was in school when Jayson moved out. As the children moved along from preschool to school, Michelle began taking classes. Michelle met with the reentry counselor at Cabrillo Community College and created a plan to get a certificate of proficiency in medical assisting. She finished courses in Microsoft Windows and Microsoft Word, which she needed because, even though Jayson was very knowledgeable, Michelle had never become familiar with computers. Although she had a computer at home, she only used it for email and Jayson had set it up so that it would open directly to her email program. She expects to finish the medical assisting program by 2005. The expected salary range for medical assistants is \$1,800 to \$2,800 per month.

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<sup>2</sup> The extraordinary income for 2000 represents Jayson’s exercise of substantial stock options around the time of his separation from Michelle.

#### **IV. ISSUES**

On appeal, Jayson challenges the trial court's decision to award spousal support, arguing that Michelle had the capacity to maintain the marital standard of living on her own, that the court failed to find that he had the ability to pay the spousal support it ordered, and that the court erred in calculating the amount of the award. Jayson also argues that the court abused its discretion in awarding attorney's fees to Michelle.

#### **V. DISCUSSION**

##### *A. Spousal Support*

In its statement of decision, the trial court found that Jayson's "salary varied from \$140,000 to \$180,000 annually." The court further found: "While both have similar educational backgrounds, . . . [Jayson] is clearly skilled in the computer industry and the exercise of stock options generated thereby. [Michelle] has some training in hand-entry accounting, payroll, and bookkeeping. She had also worked previously as a waitress, a delivery person and a cashier. After the marriage, it appears that [Michelle] did all the home responsibilities so that [Jayson] could develop himself in the Tech industry and get the high paying jobs as an expert. [Michelle] had no income except for that given to her by [Jayson].

"This September will be the first opportunity for [Michelle] to return to school to train for a new career, or even to bring her previous skills up to speed in this time of technology. [Michelle] recognized and adopted the goal of becoming self-supporting within a reasonable period of time. She has been working with a re-entry counselor at Cabrillo Community College and has begun her classes. It is anticipated that she will complete her vocational training as a medical assistant by June 30, 2005. The Court finds that permanent support is not warranted. However, the Court will order [Jayson] to pay temporary support to [Michelle] in the amount of \$2,750 per month until September 2006, at which time temporary support will terminate."

Jayson did not object to the statement of decision or request any clarification or elaboration of it. Judgment was entered consistent with the statement of decision.

We begin with the presumption that the judgment of the trial court is correct. (*In re Marriage of Bower* (2002) 96 Cal.App.4th 893, 898.) The trial court's determination of spousal support is reviewed for abuse of discretion, but " 'discretion must be exercised along legal lines, taking into consideration the circumstances of the parties, their necessities and the financial ability of the [supporting spouse].' " (*In re Marriage of Laube* (1988) 204 Cal.App.3d 1222, 1225.) Where the court's determination rests upon its factual findings, we review the ruling under the substantial evidence standard. (*Bono v. Clark* (2002) 103 Cal.App.4th 1409, 1430.) We view the entire record in the light most favorable to the prevailing party to determine whether there is substantial evidence to support the trial court's findings and resolve all conflicts in the evidence and draw all reasonable inferences in favor of the findings. (*In re Marriage of Duffy* (2001) 91 Cal.App.4th 923, 931.)

Spousal support is governed by statute. (Fam. Code, §§ 4300-4360.)<sup>3</sup> Section 4330 authorizes the trial court to order a party to pay spousal support in an amount, and for a period of time, that the court determines is just and reasonable, based on the standard of living established during the marriage, taking into consideration the circumstances set forth in section 4320. (§ 4330, subd. (a).)

The circumstances listed in section 4320 include: "(a) The extent to which the earning capacity of each party is sufficient to maintain the standard of living established during the marriage, taking into account all of the following: [¶] (1) The marketable skills of the supported party; the job market for those skills; the time and expenses required for the supported party to acquire the appropriate education or training to develop those skills; and the possible need for retraining or education to acquire other,

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<sup>3</sup> Hereafter, all statutory references are to the Family Code.

more marketable skills or employment. [¶] (2) The extent to which the supported party's present or future earning capacity is impaired by periods of unemployment that were incurred during the marriage to permit the supported party to devote time to domestic duties. [¶] . . . [¶] (c) The ability of the supporting party to pay spousal support, taking into account the supporting party's earning capacity, earned and unearned income, assets, and standard of living. [¶] . . . [¶] (g) The ability of the supported party to engage in gainful employment without unduly interfering with the interests of dependent children in the custody of the party." (§ 4320, subs. (a), (c), (g).) Section 4320, subdivision (l) provides: "The goal [is] that the supported party shall be self-supporting within a reasonable period of time. Except in the case of a marriage of long duration as described in Section 4336, a 'reasonable period of time' for purposes of this section generally shall be one-half the length of the marriage. However, nothing in this section is intended to limit the court's discretion to order support for a greater or lesser length of time, based on any of the other factors listed in this section, Section 4336, and the circumstances of the parties."

Jayson contends, as he did at trial, that the instant order is excessive because Michelle has the capacity to maintain her standard of living. He argues that the trial court should have limited the support order to a total of four years (half the length of the marriage) as contemplated by section 4320, subdivision (l), because Michelle has existing job skills and no demonstrated need for retraining. The argument neglects all the evidence to the contrary.

Although section 4320, subdivision (l) suggests, as a guideline, setting half the length of marriage as the goal for self sufficiency, the subdivision does not deprive the trial court of its discretion in setting a spousal support award. Michelle has primary responsibility for three young children and no marketable skills to speak of. Only one of her children had started school when Jayson announced his plans to end the marriage. Michelle had some experience paying bills for her father's hobby shop, but no real

understanding of bookkeeping and no training in computerized bookkeeping or accounting. And she has never earned more than \$800 per month in her life. She has undertaken retraining in a program that she can complete at times her children are in school and that will provide her with the skills to earn a living wage by June 2005. This is sufficient evidence to support a finding that Michelle's current earning capacity is insufficient and that she needs training. Michelle's need for training coupled with the young age of her three children indicates to us that the court did not abuse its discretion in extending the support order to September 2006, a little over six years after separation.

Jayson contends that the trial court erred in finding that his income ranged from \$140,000 to \$180,000 per year because this range does not reflect his current income. The argument is misplaced because the finding relates to the court's determination of the marital standard of living, not to Jayson's current salary. (§ 4320, subds. (a), (d).)

Jayson also argues that the trial court failed to make the finding that he had the ability to pay spousal support. Jayson waived this claim by failing to request the finding and by failing to object to the statement of decision. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133-1134.) Although the trial court must make "specific factual findings with respect to the standard of living during the marriage," regardless whether findings are requested (§ 4332), other express findings are required only upon request of a party. (*In re Marriage of Arceneaux, supra*, 51 Cal.3d at pp. 1133-1134.) Thus, if the trial court did not make a finding that Jayson has the ability to pay, we imply the finding in support of the judgment. (*Id.* at p. 1134.)

Jayson's primary argument is that the court erred in calculating the amount of the award because even though his current salary is \$140,000 per year, since that figure represents Canadian dollars, his actual annual income in U.S. dollars is something less than that. Although Jayson claims there is evidence that his earnings are not what they had been, the only reference to the issue appears in Jayson's July 1, 2003 application for



an order to modify the support and visitation orders. These materials were not admitted at trial or otherwise brought to the court's attention.

More to the point, Jayson never argued that his income should be calculated differently than it had been in the past. Jayson's position was that Michelle did not need support. In his trial brief he argued that spousal support should be terminated "quickly." In his closing argument he did not urge the court to deny the support request. Rather, he argued that support should be terminated after half the length of the marriage, about eight months down the road. By failing to litigate the issue of the Canadian/U.S. exchange rate, Jayson cannot raise it for the first time on appeal. (*In re Marriage of Hinman* (1997) 55 Cal.App.4th 988, 1002.) This is not an arbitrary rule of procedure. It relates to issues of fairness, judicial economy, and the mechanics and scope of appellate review. Unless the party brings the point to the attention of the trial court, the opposing party has no reason to contest it and the trial court has no opportunity to rule upon it. With but a few exceptions that are not relevant here, if the party fails to raise the issue below, he or she cannot raise it on appeal. If the rule were otherwise, parties in most cases would be careful to be silent during trial and as a result, few judgments would withstand an appeal. (See *Sommer v. Martin* (1921) 55 Cal.App. 603, 610.) Further, where the omission involves an issue of substance, the result is that there is no evidence in the record for the appellate court to review. That is the case here. Accordingly, we find the issue was waived.

Finally, there is sufficient evidence to support the court's order. Jayson had been voluntarily paying Michelle \$5,000 to \$6,000 per month for combined child and spousal support for many months before she was forced to obtain a court order for support. He is now earning roughly the same amount he was earning then. Even if his current salary is something less than it was previously, his earning capacity may be used to determine the amount of spousal support. (§ 4320, subd. (c).) The trial court impliedly relied upon this factor in finding that Jayson "excels in the computer software and business industries."

Jayson's significant earning capacity is demonstrated by his earnings history. That is enough evidence to support the court's spousal support award.

*B. Attorney's Fees*

The portion of the judgment relating to attorney's fees states: "The Court finds that while [Jayson] was Pro Per during trial, he prepared and utilized spreadsheets and used his laptop and printer during the trial. Also, in view of the breaches of fiduciary duty, [Michelle] would have been at an extreme disadvantage but for the assistance of counsel. The Court finds [Jayson] has the ability to pay attorney's fees. Therefore, pursuant to California Family Code Sections 271, 2030, 1100 and 1101, the Court orders [Jayson] to pay [Michelle's] attorney fees in the amount of \$19,836.63."

Although the trial court based the award of fees on four different code sections, we may uphold the court's decision if it is correct under any one of those provisions. (Cf. *People v. Zapien* (1993) 4 Cal.4th 929, 976, if a decision is right upon any applicable theory of the law, it must be sustained.) Since we find the decision is supportable under section 2030, we need not consider the trial court's other bases for the order.

As relevant here, section 2030, subdivision (a)(1) provides that "the court shall ensure that each party has access to legal representation to preserve each party's rights by ordering, if necessary based on the income and needs assessments, one party, . . . to pay to the other party, or to the other party's attorney, whatever amount is reasonably necessary for attorney's fees . . . ." The court may make an award of attorney's fees under section 2030 "where the making of the award, and the amount of the award, are just and reasonable under the relative circumstances of the respective parties." (§ 2032, subd. (a).)

The trial court enjoys broad discretion in awarding attorney's fees in marital proceedings. (*In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 314.) In exercising that discretion, the court "shall take into consideration the need for the award to enable each party, to the extent practical, to have sufficient financial resources to

present the party's case adequately, taking into consideration, to the extent relevant, the circumstances of the respective parties described in Section 4320." (§ 2032, subd. (b).) " 'A *disparity* in the parties' respective circumstances may itself demonstrate relative 'need' even though the applicant spouse admittedly has the funds to pay his or her fees.' " (*In re Marriage of Cheriton*, *supra*, 92 Cal.App.4th at p. 315.)

The record in this case demonstrates a marked disparity between the circumstances of the two parties. Jayson had worked at high-paying jobs for the last 10 years; Michelle had worked only in the home. Jayson had been nearly continuously employed and was employed and earning a very respectable income at the time of trial. Michelle was unemployed and engaged in training to become a medical assistant. Even once her training was complete, Michelle did not expect to earn more than \$33,600 per year. This disparity in circumstances is sufficient in our view to warrant the order the trial court made.

Jayson contends that the award is improperly based upon an erroneous calculation of his income, arguing, as he did in connection with the spousal support award, that he effectively earns much less than \$140,000 per year. We reject the contention for the same reason we rejected it above.

Jayson also argues that to the extent the fee was awarded as a sanction, it was improper because he did not receive notice of the hearing. Jayson is wrong. In every request for a spousal support order, Michelle requested attorney's fees, as well. Jayson admitted as much in his closing argument and argued that the parties should bear their own costs. That is to say, Jayson had actual notice that Michelle was seeking attorney's fees.

Jayson also claims that the court did not consider the litigants' respective needs for a fee award. This is also incorrect. The trial court pointed out that Michelle needed to incur the fees because Jayson had breached his fiduciary duty to her. That is, Jayson had withheld or obscured information that Michelle would not have been able to obtain

without the assistance of counsel. The court expressly found that Jayson had the ability to pay and impliedly found that Michelle needed the fee award because she did not have the resources to pay counsel. The record bears this out. Michelle had no liquid assets and no income. Jayson, on the other hand, had a very respectable income upon which to draw. There was no error.

**VI. DISPOSITION**

The judgment is affirmed. Respondent shall have her costs on appeal.

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Premo, J.

WE CONCUR:

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Rushing, P.J.

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Elia, J.